

ASSEMBLY BILL

No. 1700

Introduced by Assembly Member Pavley
(Principal coauthor: Senator Escutia)
(Coauthor: Assembly Member Berg)
(Coauthor: Senator Kuehl)

February 22, 2005

An act to add Section 188 to the Code of Civil Procedure, relating to secrecy agreements.

LEGISLATIVE COUNSEL'S DIGEST

AB 1700, as introduced, Pavley. Secrecy agreements: public dangers.

Existing law specifies that certain types of information are confidential or subject to privilege, and may not be introduced as evidence in a court action. Existing law also allows the parties to a civil action to settle their dispute under whatever terms they agree upon.

This bill would provide that in an action based upon the existence of a public danger, as defined, evidence of or information concerning a public danger that was discovered during the course of litigation, whether or not that evidence or information was filed with the court, shall be presumed to be public information and may not be kept secret pursuant to agreement of the parties or by court order, except as specified. However, the bill would provide that this information may be kept secret for a period that the court deems appropriate only pursuant to a court order based upon the court's independent findings, as specified.

The bill would further provide that unless the information is protected from disclosure by court order pursuant to the bill, in an

action based upon a public danger, any agreement or contract or portion of an agreement or contract that restricts a party from disclosing information relating to the public danger is void as contrary to public policy, and may not be enforced. The bill would also specify that the court may require the requesting party to provide an identifying log or other document. The bill would prohibit an attorney from selling or offering for sale any information obtained through discovery to any member of the State Bar or to any other person in violation of the prohibitions on attorney solicitation, fee splitting, or financial arrangements among lawyers or nonlawyers, as specified, and provide that a violation of those provisions shall be a basis for professional discipline by the State Bar. The bill would also set forth various findings and declarations by the Legislature.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. The Legislature finds and declares all of the
2 following:
3 (a) Secrecy agreements that prohibit disclosure to the public or
4 public safety agencies of information relating to public dangers
5 that cause substantial bodily injury or death are injurious to the
6 health, safety, and well-being of all Californians.
7 (b) Secrecy agreements can have tragic consequences. A
8 widely known example of the disastrous consequences of secrecy
9 agreements is the tragedy resulting from dangerous defects in
10 Firestone tires, which have reportedly caused more than 150
11 deaths and more than 500 injuries worldwide. For many years,
12 Bridgestone/Firestone, Inc. knew about these dangerous defects,
13 but kept the information out of the public eye by secretly settling
14 many lawsuits brought as a result of crashes related to defective
15 tires. During that time, the public continued to drive on Firestone
16 tires, unaware of the mortal danger to their families and
17 themselves. As a result of these hidden, dangerous defects, on
18 August 9, 2000, Bridgestone/Firestone, Inc. and Ford Motor Co.
19 jointly announced that Firestone would recall over 14 million
20 tires. In the absence of a secrecy agreement, information about
21 this dangerous product could have been disclosed publicly, which
22 could have saved lives and avoided injuries. However, the

1 companies demanded secrecy as the price of compensation for
2 victims, resulting in many deaths and injuries that could have
3 been avoided absent demands for secrecy agreements.

4 (c) Secrecy agreements can allow companies to shield
5 information from public view and can permit these companies to
6 continue illegal practices without accountability.

7 Similar circumstances allowed the secret closing of over 200
8 General Motors side impact gas tank fire cases. A federal district
9 court in Montana discovered that a total of approximately five
10 hundred million (\$500,000,000) was paid to plaintiffs in those
11 cases. The recent removal from the market of the drug Vioxx and
12 recent public disclosures of the dangers of suicide in children
13 who use antidepressants raise serious questions about prior
14 efforts to keep such information from the public. Recent
15 disclosures show that priests in some parts of the country who
16 had molested children were able to move and continue to live in
17 proximity to other children because claims against them were
18 settled secretly.

19 (d) Secrecy agreements allow companies to shield
20 life-threatening dangers and harmful practices from public view,
21 thereby severely jeopardizing public welfare and safety. It is
22 against the public interest to allow secrecy agreements to keep
23 information regarding public dangers to remain secret, except in
24 very limited circumstances upon careful independent judicial
25 oversight and review.

26 SEC. 2. Section 188 is added to the Code of Civil Procedure,
27 to read:

28 188. (a) It is the intent of the Legislature to better protect
29 Californians from death or substantial injury caused by any
30 public danger, including, but not limited to, defective products,
31 environmental hazards, and individuals who physically harm,
32 abuse, or molest others, by creating a presumption against
33 secrecy for settlement agreements and “confidentiality”
34 agreements, whether or not filed with the court, and to protect the
35 openness of information acquired through discovery.

36 (b) Notwithstanding any other provision of law, in an action
37 based upon the existence of a public danger, evidence of or
38 information concerning a public danger that was discovered
39 during the course of litigation, whether or not that evidence or
40 information was filed with the court, shall be presumed to be

1 public information and may not be kept secret pursuant to
2 agreement of the parties or by court order, except as provided in
3 this section. This information may be kept secret for a period that
4 the court deems appropriate only pursuant to a court order based
5 upon the court's independent finding that either of the following
6 exist:

7 (1) The information is a trade secret or otherwise privileged
8 under existing law.

9 (2) All of the following are present:

10 (A) An overriding interest exists that overcomes the right of
11 public access to the information.

12 (B) The overriding interest supports keeping the information
13 secret.

14 (C) A substantial probability exists that the overriding interest
15 will be prejudiced if the information is not kept secret.

16 (D) The proposed secrecy is narrowly tailored to protect the
17 secrecy only of that information for which an overriding interest
18 exists.

19 (E) No less restrictive means exist to achieve the overriding
20 interest.

21 (c) Unless the information is protected from disclosure by
22 court order pursuant to subdivision (b), in an action based upon a
23 public danger, any agreement or contract or portion of an
24 agreement or contract that restricts a party from disclosing
25 information relating to the public danger is void as contrary to
26 public policy, and may not be enforced.

27 (d) In order to implement this section, the court may require
28 the requesting party to provide an identifying log or other
29 document.

30 (e) As used in this section:

31 (1) "Public danger" means an instrumentality, including, but
32 not limited to, any device, instrument, person, entity, procedure,
33 or product, or a condition of a device, instrument, person, entity,
34 procedure, or product, that has caused and is likely to further
35 cause substantial bodily injury or death. "Substantial bodily
36 injury" includes substantial psychological trauma directly caused
37 by behavior or conduct.

38 (2) A court's "independent finding" under subdivision (b)
39 means that the court has made an independent determination
40 based on a review of the law as it applies to the facts and not

1 based in whole or part on a stipulation of the parties to keep
2 information secret.

3 (3) “Overriding interest” under subparagraph (A) of paragraph
4 (2) of subdivision (b) may include, but is not necessarily limited
5 to, concealing the identity of certain victims of harm, including
6 personal information about children and the victims of abuse, and
7 concealing certain confidential business information relating to
8 such matters as the personal addresses of corporate officers or
9 board members.

10 (f) An attorney shall not sell or offer for sale any information
11 obtained through discovery to any member of the State Bar or to
12 any other person in violation of the prohibitions on attorney
13 solicitation, fee splitting, or financial arrangements among
14 lawyers or nonlawyers included in Rules 1-320, 1-400, and 2-200
15 of the Rules of Professional Conduct adopted by the Supreme
16 Court. Violation of this paragraph shall be a basis for
17 professional discipline by the State Bar. This section does not
18 alter or mitigate any existing rule or provision that may also be
19 applicable to the conduct.